# UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

# KELDENERI CORPORATION d/b/a SAN LEANDRO NISSAN HYUNDAI KIA

and Case 32-CA-22510

32-CA-22518

GOOD CHEVROLET, INC. d/b/a GOOD CHEVROLET

CHEVROLEI

and Case 32-CA-22520

F. H. DAILEY MOTOR CO.

and Case 32-CA-22521

McNEVIN CADILLAC d/b/a McNEVIN CADILLAC VW

and Case 32-CA-22522

WASHINGTON TOWNSHIP CENTRAL CHEVROLET CO., d/b/a CENTRAL CHEVROLET

and Case 32-CA-22523

BROADWAY MOTORS, INC. d/b/a BROADWAY FORD

and Case 32-CA-22524

EAST BAY AUTOMOTIVE COUNCIL:
EAST BAY AUTOMOTIVE MACHINISTS
LOCAL LODGE NO. 1546, affiliated with
MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190; AUTO, MARINE
AND SPECIALTY PAINTERS UNION, LOCAL
NO. 1176; AND TEAMSTERS AUTOMOTIVE
EMPLOYEES UNION LOCAL NO. 78

Valerie Hardy-Mahoney, Esq., of Oakland, California for the General Counsel.

David Rosenfeld and Caren P. Sencer, Esqs., Weinberg, Roger & Rosenfeld of Alameda, California for the Charging Party.

Ned Fine, Esq., Fine, Boggs & Perkins, LLP, of Half Moon Bay, California and Charles Ben Waud, Esq., McDowell Associates, of Burlingame, California, for the Respondents.

#### **DECISION**

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#### Statement of the Case

**CLIFFORD H. ANDERSON, Administrative Law Judge:** I heard the above-captioned case in trial in Oakland, California during the months of October, November, and December 2006, pursuant to an order rescheduling hearing issued by the Regional Director for Region 32 of the National Labor Relations Board (the Regional Director) on October 26, 2006. That order rescheduled a consolidated proceeding which arose as follows.

On February 22, 2006, the East Bay Automotive Council (the Council or the Charging Party, or the Union): East Bay Automotive Machinists Local Lodge No. 1546, affiliated with Machinists Automotive Trades District Lodge No. 190 (the Machinists); Auto, Marine and Specialty Painters Union, Local No. 1176 (the Painters); and Teamsters Automotive Employees Union Local No. 78 (the Painters), filed a charge with Regional 32 of the National Labor Relations Board (the Board) docketed as Case 32-CA-22510 against the Keldeneri Corporation d/b/a San Leandro Nissan Hyundai KIA (San Leandro Nissan).

The Council filed a second charge with the Board docketed as Case 32-CA-22518 on February 28, 2006 against San Leandro Nissan. On April 28, 2006, the Regional Director issued an order consolidating cases and consolidated complaint and notice of hearing respecting these two charges. A timely answer was filed.

On February 27, 2006, the Council filed a charge with the Board docketed as Case 32-CA-22520 against Good Chevrolet, Inc. d/b/a Good Chevrolet (Good Chevrolet). On April 28, 2006, the Regional Director issued a complaint and notice of hearing respecting the charge. A timely answer was filed.

On February 27, 2006, the Council filed a charge with the Board docketed as Case 32-CA-22521 against F. H. Dailey Motor Co. (F. H. Dailey). On April 28, 2006, the Regional Director issued a complaint and notice of hearing respecting the charge. A timely answer was filed.

On February 27, 2006, the Council filed a charge with the Board docketed as Case 32-CA-22522 against McNevin Cadillac d/b/a McNevin Cadillac VW (McNevin Cadillac). On April 28, 2006, the Regional Director issued a complaint and notice of hearing respecting the charge. A timely answer was filed.

On February 27, 2006, the Council filed a charge with the Board docketed as Case 32-CA-22523 against Washington Township Central Chevrolet, Inc. d/b/a Central Chevrolet (Central Chevrolet). On April 28, 2006, the Regional Director issued a complaint and notice of hearing respecting the charge. A timely answer was filed.

On February 27, 2006, the Council filed a charge with the Board docketed as Case 32-CA-22524 against Broadway Motors, Inc. d/b/a Broadway Ford (Broadway Ford). On April 28, 2006, the Regional Director issued a complaint and notice of hearing respecting the charge. A timely answer was filed.

The above six complaints were consolidated by order of the Regional Director on April 28, 2006 and, following various postponements, came on for a common hearing on October 3, 2006.

The complaint against San Leandro Nissan alleges and the answer denies that on or about October 8, 2005, San Leandro Nissan agents surveilled employees as they engaged in union activities and on or about October 12, 2005, interrogated and subjected an employee to a coercive confrontation because of the employees union and/or protected concerted activities, thereby violating Section 8(a)(1) of the Act.

The six complaints, as amended at the hearing, allege, and the answers admit, *inter alia*, that San Leandro Nissan, Good Chevrolet, F. H. Dailey, McNevin Cadillac, Central Chevrolet, and Broadway Ford (collectively called the Respondents) engaged in collective bargaining with the Charging Party as an association, the East Bay Motor Car Dealers, Inc. (the Association), in the period May – October 2005 respecting a unit of employees employed by the Respondents.

The complaints further allege, and the answers deny, that the Respondents implemented certain unilateral changes to unit employees' wages, hours and working conditions in and after October 2005, at a time when the Association and the Charging Party had not reached an overall impasse in negotiations. In the alternative, in certain of the complaints, the General Counsel contends the Respondents had implemented certain changes in terms and conditions of unit employees' working conditions in a manner inconsistent with the Respondents' last offer. Finally, the complaints allege that the conduct attributed to the Respondents violated Section 8(a)(5) and (1) of the Act.

## Findings of Fact

Upon the entire record herein,<sup>1</sup> including scholarly briefs from the Respondent, the Charging Party and the General Counsel, I make the following findings of fact.<sup>2</sup>

#### I. Jurisdiction

The Respondents are, and each of them is, California corporations located in the East Bay of the San Francisco Bay Area, California, engaged in the business of the retail sale and service of automobiles. At all material times, each Respondent has been a member of the East Bay Motor Dealers, Inc., (the Association) an organization composed of various employers engaged in the sale and service of automobiles, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

The Respondents collectively, and each of them individually, in the course and conduct of their business described above, have enjoyed annual gross revenues in excess of \$500,000 and collectively and individually have annually purchased and received from outside the State of California, goods and services valued in excess of \$5,000.

Based on the above, there is no dispute and I find the Respondents and each of them are and have been at all times material, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

# II. Labor Organizations

The record establishes, there is no dispute, and I find the following, at all times material: The Machinists Automotive Trades District Lodge No. 190 (the Machinists) and Specialty Painters Union, Local No. 1176 (the Painters), and Teamsters Automotive Employees Union Local No. 78 (the Teamsters) are, and each of them is, labor organizations within the meaning of Section 2(5) of the Act. The Machinists, Painters and Teamsters comprise the East Bay Automotive Council. The Council is labor organization within the meaning of Section 2(5) of the Act.

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<sup>&</sup>lt;sup>1</sup> The General Counsel on January 16, 2007, moved to correct a typographical error in GC Exh. 49 which recited an amendment to the complaints. Neither the Respondents nor the Charging Party opposed the motion. The motion is hereby granted. The exhibit and the amendment to the complaint against Broadway Ford are corrected to refer to complaint paragraph 12(c) rather than 12(b).

<sup>&</sup>lt;sup>2</sup> As a result of the pleadings and the stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

I found each bargaining participant witness to be honestly endeavoring to recall and describe the detailed events of the entire bargaining process at issue. Some had more specific memories, some had more detailed notes. As the parties conceded on brief, the record was essentially without critical testamonial dispute respecting bargaining. In a few cases the witnesses were in substantial dispute respecting details as noted infra. I have not discussed nor resolved testimonial disputes herein if the differing views were not material to or determinative of the relevant issues advanced by the parties.

## III. The Alleged Unfair Labor Practices

## A. Background

The Association is a venerable entity which has negotiated with the Council for many years<sup>3</sup> entering into collective bargaining agreements on its own behalf and on behalf of its dealer members. The most recent contract was negotiated in 2001, was effective on July 1, 2001, and expired on its face on June 30, 2005. The Association also bargained with the Council for a new agreement in 2005. The member dealers of the Association covered by the 2005 negotiations are the Respondents herein<sup>4</sup>. The bargaining unit involved covered the Association member employers in the following unit (herein the Unit):

All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the July 1, 2001 through June 30, 2005 collective bargaining agreement between the Union and the Association; excluding all other employees, guards, and supervisors as defined in the Act.

The incorporated-by reference contract recognition clause recognizes the Union as the representative of the employers' employees in Alameda, Contra Costa and San Joaquin, California counties whose duties fall within the work jurisdiction of East Bay Automotive Machinists Local Lodge No. 1546, affiliated with Machinists Automotive Trades District Lodge No. 190; Auto, Marine and Specialty Painters Union, Local No. 1176; and Teamsters Automotive Employees Union Local No. 78.

In actuality all the employers involved herein are within Alameda County as are all Unit employees. The duties and or titles of Unit employees include mechanics also referred to as technicians, parts technicians, body shop technicians, detailers, installers, helpers and utility employees. Some 180-190 employees employed by the employers were in the Unit at relevant times.

The great majority of the Association's member employers at relevant times have been automobile dealerships selling the traditional, domestic branded automobile lines such as those manufactured by Ford and General Motors. The number of automotive and truck retail sales made by the Association members during the relevant period has suffered both comparatively to other product lines and absolutely.

The Association's agents who participated in essentially all the 2005 bargaining include: Mr. Charles "Ben" Waud, the Association's counsel and lead negotiator; Association President, Chairman of the Association bargaining committee and principal of Central Chevrolet, Mr. William Brunelli; and principal of F. H. Dailey, Mr. Dan Gatto.

The Council's primary bargaining team comprised Don Crosatto, Council President, lead negotiator and Machinists Senior Area Director; Mr. Craig Andrews, Machinists Area Director; Mssrs. Michael Cook, Pat Woodward and Dave Asplin, Machinists Business Representatives; and the shop stewards of the Association Employers.

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<sup>&</sup>lt;sup>3</sup> Ten Association-Union contracts negotiated from the 1960s forward were placed in evidence.

<sup>&</sup>lt;sup>4</sup> A seventh dealer, Cavanaugh Motors, closed and is not the subject of a charge in these proceedings. McNevin Cadillac d/b/a McNevin Cadillac VW sold its Cadillac dealership and closed its Volkswagen operations. It no longer employs unit employees.

The July 1, 2001 through June 30, 2005 collective bargaining agreement was a substantial and detailed agreement comprising many pages and articles. It provided, inter alia, specific wage rates, medical coverage provided by the Automotive Industries Welfare Trust Fund, and a pension plan, the Automotive Industries Pension Trust Fund.<sup>5</sup> The health coverage offered did not provide distinctions in coverage between families and individual employees or provide for an option of no coverage for electing employees. Each unit employee had a set amount contributed to the funds on his or her behalf.

The contract contained Article XI: Incentive and Productivity Programs, which provided in part:

1. For a productivity system to work efficiently and equitably, certain procedural and equipment issues may need to be addressed to successfully implement the system. Individual programs may be instituted by member firms of the East Bay Motor Car Dealers Association under the following conditions:

Any Employer signatory to this Agreement may implement an incentive system which may result in individual technician compensation above or below the base rates as set forth in Article XX. Each dealership shall uniformly administer its incentive systems based upon factor or Chilton manuals.

The article then provided for a transition committee comprised of equal numbers of unit employees and management staff to consider implementing a productivity system. It also provided an implementation process under the direction of equal numbers of union and management representatives and procedures for interest arbitration of unresolved differences between the Union and the employer respecting the incentive system. At the time of the contracts expiration, only one Association Employer, F. H. Dailey, had utilized Article XI to convert the compensation system of its unit employees.

#### B. Events

# 1. Pre-Bargaining

The two sides' lead bargaining representatives, Waud and Crosatto, as well as many of the other participants, were experienced negotiators who had engaged in earlier negotiations on behalf of the parties. In anticipation of the beginning of negotiations for a new contract, Waud and Crosatto met for lunch on March 31, 2005. During the discussions at that meeting, Waud in essence put Crosatto and the Union on notice that, in the then current difficult economic times for auto dealerships, the Association would be seeking very substantial reductions in the employers' contractual payments on behalf of unit employees into health and pension plans. Crosatto in turn informed Waud that, while the Union understood times were difficult, reductions in health and pension payments of the degree and extent Waud was suggesting, absent some sort of offsets or other improvements in the new contract, would be very difficult for the Unit to accept.

Waud was also anxious to proceed with bargaining as soon as possible and urged Crosatto to meet with Unit employees and formulate proposals to present in bargaining. Waud

<sup>5</sup> Crosatto and Brunelli were trustees of both entities at relevant times

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sought to block out bargaining dates as soon as possible. Following this luncheon meeting, Waud and Crosatto agreed to a series of bargaining sessions in an April telephone call.

## 2. Bargaining

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#### a. Brief Overview

A total of 14 bargaining sessions were held in the period May 2, 2005 through September 20, 2005.<sup>6</sup> All were held by agreement at the offices of Local 1546. The final three sessions were conducted with the assistance of Federal Mediator Ruth Carpenter.

Seven witnesses testified respecting the specifics of some or all of the sessions. All but one took notes: all which were entered into evidence. So, too, written documents of various kinds were exchanged both at and between the bargaining sessions and they too were placed in evidence. As in all descriptions of long meetings, recollections of events are not complete or continuous and the versions vary to one degree or another. While there were elements of dispute regarding important matters, by-and-large the witnesses were not in conflict or the matters in dispute were not of particular significance to the issues in the case.

The sessions are presented immediately below only in the degree of detail needed to follow the development of the bargaining relevant to the issues framed by the pleadings. Conflicts, where necessary to discuss or resolve, are presented subsequently.

# b. The Opening Session - May 2

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The Association bargaining team utilized the initial session to lament the difficult economic conditions facing the Association members and their need for substantial reductions in employee contract costs. The Association focused on pension and health costs. Respecting pension costs, they discussed the surprising, unfortunate and growing unfunded liability each employer bore as well as the fact that employees were benefiting little from the onerous pension payments made on their behalf.

The Association also discussed the health costs under the contract plan. The employers sought to put a cap on their per employee dollar contribution. They also raised the possibility of changing health care carriers to obtain coverage options, i.e. coverages for either the employee alone, the employee and spouse, and the employees' entire family, which different coverages would carry varying costs for each option.

The Association indicated that it had not as yet formulated a formal opening proposal, but was putting one together. Waud asked if the Union had met with employees to prepare the Union's opening proposals, but Crosatto indicated the meeting with employees was to occur mid-month. The next bargaining meeting was scheduled for May 31.

The Union met with unit employees on May 17. At the meeting Crosatto reviewed the Association's position with employees and, in effect, warned them that the Association would soon propose very significant cuts in employer pension and health contributions for employees.

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<sup>&</sup>lt;sup>6</sup> Hereinafter references to bargaining dates refer to 2005.

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# c. May 31

The Association continued its argument that the expiring contract's health plan with its costly single offering of family health coverage was not satisfactory and, that a three-tier system providing optional coverage for the individual employee, the employee and spouse, and the employee and his or her family was far preferable. The Respondent also discussed the then current pension plan, its cost, its benefit to employees and its unfunded or withdrawal liabilities for employers. It suggested that its medical costs per employee should be caped at a rate of \$400 per month – an amount less than half of the then extant obligation. It also suggested the employers were considering reducing pension payments to \$25 per month which was an approximately 90% reduction in contributions per employee.

The Union presented a written proposal. It proposed maintenance of benefits for the health and welfare program, an increase in the employers' per unit employee pension contribution of \$20 per month with an accelerated progression of employees to higher contributions, and an increase in journeymen wages of \$1.50 per hour per year of the contract with smaller raises for other employees. The proposal further proposed the institution of a sick leave program with six days of paid sick leave per year, three personal days of leave per year and an increase in certain lengths of vacation for employees. Finally the proposal suggested "greeter" employees should be included within the bargaining unit and proposed an optional separate wage rate structure for flat rate.

The Union, through Crosatto, explained the proposal. Waud stated the Respondents would consider the proposal but that they were not considering cost increases. The parties agreed to meet the following day.

# d. June 1

The Association primarily through Waud characterized the Union's proposal of the previous day as involving substantial increased costs over a 4-year period for the employers and that it was therefore unacceptable. The Association rejected the proposal on an item-by-item basis and indicated it was rather looking for cost reductions. The Union countered with the suggestion that the employers' sought after reductions were simply absurdly large. At the meeting Waud noted that the employers were now willing to increase medical payments to \$500 per employee/per month and were interested in being able to make increased discretionary pension contributions later in the life of the contract. Crosatto expressed doubts respecting the legality of the Respondent's proposal to make later discretionary pension payments. The parties agreed to meet on June 13.

40 e. June 13

Waud opened the session by announcing that since the last meeting the Association had received new and incresed pension withdrawal liability calculations from the Pension Trust which, in his view, made it even more necessary to address employer costs. He said all areas of the contract had to be considered with a view to reducing costs. He then presented the Association's first written proposal, captioned as a counterproposal to the Union's proposal.

The Association's written proposal was for a 4-year contract providing, inter alia, reduced journeyman technician wages for the first year of the contract and a freeze thereafter. It increased the allowable percentage or ratio of lesser paid installer positions to journeyman technician position; and increased the types of work that could be undertaken by installers. The proposal also proposed a new pay plan for Service Writers and lowered the wages of parts

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technicians while reserving the right to propose individual incentive programs for parts departments. Further, the proposal removed the dispatch classification from the bargaining unit and deleted anniversary and birthday holidays. The proposal reduced employer health and welfare payments to coverage for the employee only with a maximum monthly contribution during the life of the contract of \$400 as compared to the expired contracts payment levels for journeyman of over \$800 a month. Finally the Association's proposal reduced the employee pension contribution to \$25 per month for 2005 and to \$116 per month for the remainder of the contract, i.e. through June 2009, as compared to the expired contracts contribution level in 2005 for senior employees of \$466 per month, while reserving the right to make additional pension contributions at its discretion in December 2006, 2007 and 2008.

Waud addressed the terms of the proposal item by item and discussion was engendered. The Association felt its wages would be competitive and would be sufficient to retain staff but reserved the right to pay unit employees over scale. Crosatto addressed the health and welfare proposal noting that the Association was not proposing to leave the then current Automotive Industries Welfare Trust Fund but were proposing to pay only for employee health coverage an option not offered by the Trust – an impossible combination. Brunelli responded that it was his intention to propose at the annual meeting of the Automotive Industries Welfare Trust, Fund which, was scheduled for the following week, that it offer a three-tiered health coverage option. Brunelli indicated he had been advised that single employee coverage under such a plan would cost about \$350 per month.

Crosatto also indicated confusion respecting why the Association had changed its earlier expressed view that pension contributions should be set at \$25 per month to the written offers \$116 in out years. Waud indicated that the Association wanted to be responsive to the Union's argument that employees had forgone earlier wage increases to maintain pension contributions.

The service writers pay plan was discussed at some length. Crosatto indicated the Union was not opposed to the concept of a commission pay plan, but needed to consider the details of implementation. Similarly, the Union took the view the parts department pay proposal was not conceptually unreasonable, but the details needed to be discussed and understood.

During the session the Association made it clear that it was not asserting an inability to pay exiting contract wages and benefits but rather was having a difficult time and felt under economic siege. Gatto told the Union that he had gotten preliminary information regarding health coverage under the California Motor Car Dealers Association plan suggesting it offered healthcare which was less expensive and could better meet the employers' needs. Crosatto asked for information from the Association respecting the circumstances of the unit service writers as they pertained to a potential future incentive pay system. He asked for a one-year history of each unit service writer demonstrating the dollar volume of their performance.

#### f. June 14

The parties met again the next day, June 14. Gatto and Brunelli presented service writer information from their dealerships: Central Chevrolet and F. H. Dailey. They proffered half year statistics of how much labor each service writer sold. Crosatto noted that the supplied information seemingly excluded internal service writer work such as warranty work and new and used car sale preparation. He also requested information on the amount of overtime worked by the service writers. Crosatto told the Association's representatives that without the requested information the Union could not evaluate the Association proposal or even prepare a counterproposal. Following a caucus, the Union proposed that any service employee incentive

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pay system also include the customer satisfaction index factor in the pay formula. The Association rejected that suggestion as unnecessarily complex.

## g. Inter-bargaining Session Events

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After the June 14 bargaining session, by letter dated June 16, 2005 to Waud, Crosatto requested information "in order to do a meaningful comparison of the current conditions for Service Advisors and the Association's proposal". The letter requested:

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**By Dealership and by Service Advisor**, [italics and bolding in original] the last six months sales of customer pay labor and parts, warranty labor and parts, ESP labor and parts, PDI labor, Internal labor and parts and any quick service labor and parts.

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**By Service Advisor:** [italics and bolding in original] The number of overtime hours worked per month for the last six months and annual earnings for each Advisor for calendar 2004. At your discretion, you may redact the names of the individuals. Our interest is in trying to determine how significant overtime work is and if it is worth trading for another system.

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The contract expired by its terms on June 30, 2005. It was never extended.

By letter dated July 1, 2005, Waud responded with 17 pages of service writer information and a cover letter with the following text:

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Enclosed is the information you requested for Broadway Ford, Cavanaugh Motors, F. H. Daily, McNevin Cadillac and San Leandro Nissan. I believe you already have Central Chevrolet's information from negotiations, and John Buono [President of Good Chevrolet] informs me that due to recent turnover, he has no service writers who have worked as long as six months, so no meaningful statistics can be drawn.

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The Automotive Industries Health and Welfare Trust held a meeting in late June. At that meeting Brunelli moved the trust to create a three-tiered health care plan. The motion was supported by the three Association representatives and opposed by the three union representatives. The motion failed for want of a majority.

#### h. July 6

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The parties resumed negotiations on July 6. Crosatto acknowledged receipt of Waud's July information packet but indicated he had not had time to review the documents. Reviewing them, Crosatto asserted that the information was not complete, that there was no information respecting warranty work or internal parts and labor sales. He noted that Broadway Ford had not broken down the information as requested. Waud responded that the packet was all the information he could obtain at that time.

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Waud asked for a response to the Association proposal of June 13 and Crosatto answered that the Union did not accept removing the dispatchers from the unit. Discussion ensued respecting the Union's view that the unit members were not enthusiastic with the Association's proposed reductions. Unorganized area dealerships' wage and benefit packages were discussed as well as other aspects of incentive plans.

After a caucus, Crosatto presented a verbal counter offer. The proposed contract would include a one year freeze on wages and benefits and progressive increases with the exception of maintenance of medical coverage. The proposal was discussed and explained. The bargaining session ended with bargaining to resume in two days.

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# i. July 8 through July 13

The July 8 bargaining session opened with Waud informing the Union that the Association members had met and rejected the Union's freeze proposal in its totality as insufficient to reduce employer costs. Rather, Waud stated, the Association was reasserting the Associations June 13 proposal.

The Association's representatives told the Union they had investigated the health plan offered by the California Motor Car Dealers (CMCD) and felt it better met the needs of the employers. They characterized it as similar to the then applicable health coverage save that it was three tiered and cheaper. The Union through Crosatto suggested there were surely differences and the employers' representatives argued the plans important parallels.

Crosatto asked if the Association was specifically proposing the CMCD plan and noted the Association proposal of June 13 did not specify what particular plan was on offer. The Association representatives specifically told Crosatto and the Union that they were now offering the CMCD three-tier health plan in replacement of the expired contract's plan.

The Union indicated if the Association proposal was for a change in health and welfare plans, the Union needed to see all the new plans' details and features. The Association agreed and Gatto gave Crosatto the business card of CMDA insurance agent Gamble and told Crosatto to call Gamble with any questions. At this session, Brunelli asserted that as he had stated at the June 1 session, the Association must be able to discontinue retired employee's health and disability coverages.

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That same day Crosatto sent Waud an information request with the following text:

In order to properly evaluate your health and welfare proposal, we will need the following information:

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- 1) A copy of the Summary Plan Description as well as the Plan of Benefits.
- 2) A copy of the Form 5500 for the Plan.

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3) A complete cost breakdown of the various components of the Plan with a five year history of any and all cost increases.

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4) A five year history of any modifications or amendments to the Plan, including but not limited to, any increases in co-pays, changes in coverage levels, changes to drug formularies, etc.

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5) A demographic breakdown by family status of the existing bargaining unit.

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6) A copy of any contracts between motor car dealer services and the insurers and health plans with which they do business.

I would appreciate you getting this information together prior to our next meeting. Thank you for your cooperation.

On July 13 Brunelli delivered to Crosatto's attention a packet of information responsive to the request. It included 5 informational packets for PacifiCare coverages and a Blue Cross PPO prudent buyer plan director of health care professionals and institutions which coverages were offered by CMCD's health plan.

## j. July 14

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At the onset of the July 14 bargaining session Waud gave Crosatto a duplicate set of the information delivered to the Union the previous day. Brunelli noted the premiums charged by CMCD were comparable to the contract plan save for the coverage options. Crosatto made it clear he needed to review all aspects of the proposed coverage. Discussion followed with the employers noting the new plan was on offer only because the Health and Welfare Trust would not offer an optional self or self and spouse coverages. Crosatto asked about orthodontia coverage and the details of dental coverage which he did not believe were disclosed in the information he received.

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The CMCD's plan offered Kaiser, Blue Cross and PacifiCare health coverages as did the contract's Health and Welfare Trust, but Crosatto asked about coverage specifics such as the prescription coverage for non Kaiser plans and generally indicated it was not clear specifically what coverages and costs were being offered. Some but not all the information discussed was supplied by the Association bargaining team. Following a caucus Crosatto indicated the Union wanted to do a specific coverage and cost comparison matrix between the old and proposed plan and needed current costs.

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As the meeting ended the Association gave the Union a new written proposal which was similar to the earlier proposal but also included a lower hourly rate for new as opposed to current parts department employees with dealer discretion for higher rates, reiterated the proposed removal of the dispatch classification from the bargaining unit and did not name the provider of health and welfare insurance.

## k. July 27

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The next meeting was held on July 27. Crosatto was on vacation and not in attendance. Cook was acting as the head of the Union negotiating team at this meeting. The Union raised with the Association the Union's last proposal. Waud stated that the Association rejected that proposal and a union negotiator responded that it was therefore withdrawn.

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Cook noted that Association's proposal on technicians wage rates was \$24 per hour with dealer discretion to pay more. He asked what the basis for the dealers paying more would be. Waud initially acquiesced in the request but soon responded that the dealers had a longstanding past practice of paying over scale and that given that there was no need to discuss the basis for such an application of discretion. Cook recalled:

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Well, Ben [Waud] had said okay, and then kind of reversed his field on me and says, well, you know, we really don't have to give you that information because we've been doing discretionary over scale for years. And I said, that was based on the union contract of union scale of \$28.00 or whatever it was, and that's above and beyond. This is a whole different matter. You're talking about taking a new scale, which is much lower, and then compensating somewhere in there

over on top of that. It's a whole new bag, it's nothing like what it used to be. So, the past is the past, we're talking about the future, and we need to get some details on what it is you're going to be looking at, to see if we can this problem solved.

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The parties engaged in an exchange respecting Association discretion. Cook prepared a written information request seeking "a list of all those parameters that you would consider when establishing 'over-scale' wage rates." The Association took the position that there were an endless number of reasons to pay more. They noted that the Association members had always had the right and had exercised the right to pay over scale and did not have to give reasons why they might do so. Cook indicated the Union would not give the Association unfettered discretion or Carte Blanche. The Association photostatted a dictionary page giving the definition of discretion and stood by that disclosure as sufficient. The Union in turn photostatted the definitions of the words: "judgment: and "choice" which, they said were taken from the definition of discretion and sought Association disclosure of potential reasons. The process became prolonged and ultimately Waud indicated he was withdrawing the "dealer's discretion" element in the proposal. The process was essentially repeated respecting the proposal for parts department wages and the ability of the Association to pay over scale at its discretion. That element of the proposal was also withdrawn by Waud.

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Cook raised the Association proposal for a combination of reduced wages and incentive plans and asked how the dealers were planning to implement such a scheme – dealer by dealer or uniformly across the dealerships. The Association bargainers were not certain of what each dealership intended. Brunelli stated on behalf of his dealership that he had some plans but was going to wait till the contract was settled before implementing. Cook told the Association that the Union had an obligation to deal with wages in the negotiations and needed to know the incentive part of the wage scheme, to negotiate the system and include it in the contract. Waud told the Union that if that were the Union's position, the Association was withdrawing its parts department incentive program provision.

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Cook produced and provided the Respondents an information request seeking:

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On the Employers' proposal under Wages section 'C', you have proposed to reduce compensation for Installer. We would like to understand better what the actual work mix is of the Installers in each dealership. Based on the actual work being performed, the proposal may be appropriate. For us to assess this we will need to have a two-year history of type and scope of work preformed by each Installer in each dealership.

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Waud questioned the request and Cook explained that the contract language was based on earlier evaluation of duties and that the Union needed to consider the current duty mix. Waud said he would see what he could do with the request. The Union took the position that it would not continue to bargain when information requested had not been supplied. Craig asserted at one point that he could make information requests for years.

<sup>&</sup>lt;sup>7</sup> Cook used a laptop computer with a printer which allowed him to produce documents at the negotiating table.

#### I. August 5

Crosatto was again present at the August 5 meeting. Waud supplied the Union with its earlier requested demographic information regarding the unit. Waud also provided the Union information respecting installers. Crosatto testified he found this information from some dealers was not in sufficient detail regarding the specifics of what installers did and that he told the Association negotiators this. At this session, the Association provided a written offer that included the amendments to its earlier offer which occurred at the last meeting: i.e. the deletion of the discretion language in the incentive proposals.

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The parties also discussed the coverages of the CMDA plan and Crosatto's request for information respecting coverages, costs and other matters. Crosatto augmented his request with questions about the coverage. The Association indicated they would endeavor to obtain the information and reminded Crosatto that he had the plan administrator's phone number and was invited to go directly to him for information.

The negotiations turned to the Association's view that if incentive systems were in place, the unit employees would be receiving more dollars than otherwise. Gatto noted that his earlier implementation of an incentive system had resulted in his employees receiving bigger paychecks based on accomplishing more work and generating more income for their employer. The Association also discussed at some length the competitive pressures from unorganized dealerships in the area.

The Union raised the hardship upon the lower paid employees that would result from the health insurance coverage proposed by the Association. The Association made it clear that any health plan must offer a single unit employee coverage option. The Association said it was not necessarily wedded to the CMDA plan, i.e. that it could keep the existing Trust Plan in a new contract, if the Trust offered such multi-tiered options.

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Waud asked Crosatto for a Union counterproposal and Crosatto recalled he responded that the Union was working off the Association proposal. Crosatto made it clear the Union was interested in compensation plans that would increase unit employees' income, but it did not have enough information of the specifics of what the Association was proposing to make a Union counter proposal or other response. Gatto did not recall Crosatto indicating information had not been provided. Crosatto recalled he further stated: "There's still a lot of items to talk about in your proposal." Crosatto told the Association negotiators that the Union understood the position of the Association that the dealers needed to reduce costs. He indicated that the Union desired to find a way to generate enough increased employee income to absorb the added health costs and that incentive systems might well provide that possibility. The Union indicated however that it was not willing to agree in principal to such incentive plans and sign a contract so describing the plans, but only begin bargaining about the details of the systems after the contract had been reached, ratified and put into effect.

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On August 15, 2005, Crosatto sent a letter to the CMDA Director of Benefit Services asking for the following information to properly evaluate the CMDA plan in comparison with the existing coverage [numbering in the original]:

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1. We are told the Motor Car Dealers Plan covers orthodontic work. Please furnish us with a copy of the Plan and a list of those orthodontists who accept this coverage.

- 2. Please provide us with a list of current Trustees as well as anyone who has served as a Trustee in the last ten years.
- 3. In reading over the material that we were given on the Plan, it is not apparent when coverage becomes effective for new employees, nor for employees returning from a disability, layoff, or leave of absence. Please furnish us with the Plan's policy on these matters.
- 4. It appears that the Plan does not charge any late fees or liquidated damages for accounts that may be tardy or delinquent, but rather it terminates coverage for those dealers and their employees. Obviously this is a matter of great concern as cash flow issues sometimes cause Employers to pay late. Please provide us with a list of any and all Employers who have been kicked out for non-payment and a description of the circumstances under which their coverage terminated.
- 5. In reviewing your form 5500, we noticed that the Fund had very limited assets held in reserve. Even with the addition of several million dollars in assets, it appears that the Plan holds less than one month's premiums in reserve. This is a serious concern to us. Particularly, since we understand that the Northern California predecessor to this Plan went bankrupt and closed fifteen years ago due to insufficient reserves. Please provide us with a copy of your reserve policy, a copy of any cash flow studies done by the Plan and the past ten years of financial statements on this Plan.

## 25 m. August 18

The August 18 meeting was scheduled at the previous meeting at which time Crosatto testified he had forgotten a potential jury service obligation on that date. Learning on the 17<sup>th</sup> that he would in fact have to appear, Crosatto left a message for Waud that he would not be able to attend the following days session but rather Cook and Andrews would. This message was sent too late in the day for Waud to receive it before he left to attend the bargaining session on the 18<sup>th</sup>.

The meeting began with Waud asking for a proposal from the Union and Cook demurring that he was not aware of one. Cook rather desired to discuss the flat rate, incentive systems as well as the service writers' commission program and the Union's desire to negotiate changes to the expired contracts Article XI so it would allow the adjustment of wage rates based on the manufacturer of the products involved.

The parties caucused and after the caucus Cook and Andrews met with Waud in a separate office. Waud was impatient with the negotiations progress and the absence of an expected union proposal. Cook asserted he had no authority to make a counter and argued that they needed to discuss the non-wage remuneration respecting which he needed more information and the need for changes to Article XI. Waud asked for any information request in writing and informed the Union he was going to ask for the assistance of a mediator.

# n. August 25

On August 25 the parties negotiated with the assistance of Federal Mediation and Conciliation Service Mediator Ruth Carpenter. The two sides in turn described the state of the negotiations to Carpenter in the presence of the other side and thereafter the parties met separately with the Mediator. Each side advanced its position. Neither made any concessions

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or voiced agreement with or movement toward the others position. The Association complained of a paucity of union proposals, of the constant interruption of information requests and of the slow pace of negotiations. The Union complained that they were seeking information to be able to respond to the Respondent's proposals but that their information requests were only partially answered and in some cases not answered at all.

On August 26, CMCD Manager of the CMCD Employees Benefits Trust Armando Buitrago wrote Crosatto informing him that Crosatto's inquiries had been directed to him and that he would "try to address each question" Crosatto had presented. His letter provided the Summary Plan Description, a directory of providers, and a current list of Trustees as well as former trustees for a 10-year period. He enclosed ERISA information booklets and a Summary Plan Description of "our most popular programs." He answered Crosatto's questions respecting employee coverage resumption and new coverage. He described the policy respecting delinquent payments and indicated some groups coverage had been terminated for various reasons including non-payment. Finally he described the form and amount of surplus and reserves. He concluded: "I hope I have answered all of your questions, please do not hesitate to call me or Mr. Gamble with any other questions you may have."

Crosatto testified that he never telephoned Gamble or Buitrago even though he did not regard the August 26 letter as complete or sufficient because he preferred to communicate in writing. Crosatto in late September wrote to Buitrago requesting additional Form 5500s which he received in late December.

On September 1, the expired contracts health plan raised its rates from \$826 to \$877 per month per covered employee which cost increase under the then current arrangements was to come out of unit employees' wages. In this context Crosatto proposed a tax plan which he suggested could make the new expense tax deductible for employees. Waud responded that the matter should be raised at negotiations. Apparently, the Union's plan was not discussed thereafter at any bargaining session.

Sometime in mid-September the employers met and decided that they would propose to the Union that the current health coverage would be continued until January 2006 to allow the Association and the Union to search for a replacement plan that offered tiered rates and that the Association would notify the Union and bargain about such alternate coverages as soon as they became known.

# o. September 16

As the negotiations were to begin on September 16, Crosatto gave Cook the Association's response to Cook's August 18 information request. Cook then analyzed the information he had just received and found it lacking in various degrees. Crosatto testified that at a caucus on the 16<sup>th</sup>, Cook for the Union prepared a memorandum titled: "Union Concerns" dated September 16, 2005, which he gave to either Crosatto or Andrews who in turn provided it to the Association. The memo states:

The Union is concerned that we have not gotten the information that we need to formulate proposals in hopes of resolving the outstanding issues that seem to be holding up the negotiations up [sic] at this point. We are reiterating our need for complete compliance with our information requests on the subject of productivity reports and accounting for types of work being done by individuals and the health and welfare issue.

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Please be advised that we intend to discuss the issues surrounding flat-rate compensation systems at each dealership specifically. We are hereby requesting that you bring detailed information and or personnel with the detailed information and authority to commit to any tentative agreements.

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We are hopeful that the advanced notice of our intentions will give you sufficient time to make the necessary arrangements for negotiations to be fruitful.

At the session the negotiators remained in separate caucuses with the Mediator shuttling between the two parties. In due course, the Association told the Mediator they had a new written proposal. The Association's revised proposal was provided in writing to the mediator who in turn provided it to the Union.

The written revised proposal, inter alia, provided existing journeyman technicians a wage of \$27.50 effective on July 1, 2005, with annual increases on each July 1 in 2006, 2007 and 2008. Journeyman technicians hired after July 1, 2005 were to be paid at \$25 per hour or higher at the Dealer's discretion. The offer deleted the expired contract's language providing that installers after two year's employment should earn no less than 70% of the journeyman technician's rate and, added mounting and dismounting of tires as part of the permissible duties of installers.

The offer presented a pay plan for service writers based on a commission formula with details and provided that overtime would be paid in accordance with California law applicable to commission employees. Newly hired service writers would have a more limited draw for their first two years. The offer presented a wage rate for parts technicians effective on July 1, 2005 of \$21.50 with a rate of \$22 effective January 1, 2007 through June 30, 2009. The dealers specifically reserved the right to pay over scale and to propose individual incentive programs for parts departments.

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The proposal provided a new hire rate for body shop journeymen effective on October 1, 2005 of \$21.00 through the life of the contract. Current body shop journeymen would have a "one time" election to choose between the current rate with no incentive plan or to opt for a flat rate plan. Helpers were to be hired at \$10 per hour or more at dealer's discretion.

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The offer contained the following provision: "IAM will co-operate with the members of the dealers association in the prompt installation of a flat rate pay system within 90 days maximum."

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The offer removed the dispatch classification from the bargaining unit and deleted birthday and anniversary holidays. It provided that the employers would pay \$400 per employee plus 30% of the cost of health insurance over \$400. It stated: "The association members will provide health insurance by a separate plan and will no longer be members of the Automotive Industries Health and Welfare Trust. As to pensions, the offer labeled as a tentative proposal, a maximum employer contribution to the existing pension trust on behalf of each employee of \$25 per month retroactive to 7/1/05 and specifically reserved the right to employers to make additional contributions at their discretion in December 2006, 2007 and 2008.

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Crosatto testified that after receiving the proposal and considering it, he told the Mediator that the proposal was introducing items never raised in bargaining, reintroduced items the employers had earlier withdrawn, and proposed the negotiation of flat-rate systems that would be very time consuming to bargain.

At about this time the parties met in an empty office and discussed their positions. Waud addressed the need to speed the negotiations. The Association took the position that flat rate payments were of value, but that the negotiations could not spend a great deal of time on them. The Union argued that to the contrary such systems would require a great deal of time to bargain and must be done dealer by dealer with much more information provided. The Association made it clear it was not going to negotiate such a system "at the table". The Union answered that in order to persuade the unit employees to accept any contract reached with the cuts the Respondents were going to require, a better pay system would have to be included.

The Union pressed the Association for more information and the complete provision of the information earlier requested by the Union.<sup>8</sup> Crosatto recalled that Waud took the position that the Respondents simply were not going to engage in protracted negotiations respecting flat rate systems and that the negotiations had simply gone on too long. Waud and Brunelli at that point refused to provide the Union with the degree of information they claimed they needed on the subject. Crosatto argued that he was considering canceling any further negotiations unless and until the information had been supplied. Waud objected and the parties agreed to meet again on September 20.

## p. September 20

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The parties met with the Mediator both in caucuses initially and later in joint session. The Union made a counter proposal in a caucus with the Mediator proposing a two-year wage freeze with the employees paying the increased cost of health coverage. The Mediator described the proposal to the Association in her meeting with the Association caucus. Waud testified that the Association did not know if the freeze was a Union proposal or a suggestion initiated by the Mediator. In all events it was not satisfactory to the Association. The Union also reiterated its position that it would not defer negotiations on flat rate pay proposals until after a contract was reached. Rather it wished to negotiate everything to be in the agreement before it was entered into.

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After lunch, the parties met together in joint session with the Mediator. The Association presented a written offer which it characterized as its last, best and final proposal. The offer, similar in format to that of September 16, discussed supra, set forth changes to be made to the 2001 contract. The terms on offer were essentially the same as those of its September 16 offer with various changes in many cases either, delaying reductions or applying changes to new hire employees rather than continuing employees. Thus, for example, the offer proposed an initial wage freeze for journeyman technicians as opposed to a wage cut,<sup>9</sup> limited the application of the 70% journeyman technician language to newly hired installers, and indicated the earlier described change in health insurance coverage would occur not later than January 1, 2006.

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The offer also added an explicit statement that after October 1, 2005, the Association would no longer pay for disability and retiree health and welfare coverage. The proposal included a change in the contract holiday language respecting Thanksgiving and Christmas Eve holidays, proposed that all past practices currently in effect at each dealership would be

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<sup>&</sup>lt;sup>8</sup> It is neither crystal clear nor undisputed to what extent the noted events occurred in the parties' meeting or as part of the shuttle negotiations with the information carried by the negotiator or a combination of the two.

<sup>&</sup>lt;sup>9</sup> The expired contracts January 1, 2005 wage rate for Machinist represented journeymen mechanic unit employees was \$28.46 per hour

honored for the term of the agreement and proposed the contract would run from the date of ratification through 9/31/09.

Waud presented the offer to the Union and then complained of an absence of union proposals or counter proposals on contractual provisions and asserted the parties were at impasse. Waud asked that the Union put the offer to a vote of the membership.

The parties discussed each element in the proposal. Union witnesses testified Crosatto told Waud that the proposal to eliminate the dispatcher as a represented or bargaining unit position was not a mandatory subject of bargaining and that Waud responded that he wanted the Union to consider it and it would not be removed from the proposal. So, too they recalled that Crosatto challenged the legality of the Respondent's proposal to reserve to itself the right to make discretionary payments into the employees pension trust and the Association agents stated they would check on the question. The Association negotiators testified that the two subjects' references in their proposal were deleted in consequence of Crosatto's statements. Gatto's notes refer to a discussion of "certain points (1 by 1) Struck 2 see sheet". The marked up copy of the September 20 proposal attached to Gatto's notes has the two proposals under challenge here struck from the offer. It also corrects the proposed contract expiration date from 9/31/09 to 9/30/09, there being only 30 days in September.

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Crosatto testified that he argued that the Association final offer was premature, that the parties were not at impasse and the union was willing to negotiate flat rate compensation but wished to do so at the bargaining table as part of the contract negotiations and not as an after contract process. He also recalled he asked if the Association's offer's unnamed health care plan was CMDA and that Waud said it was.

Waud asked again that the Union vote the proposal and the Union said they would take the request under advisement. Crosatto asked that the Union's information requests be answered with the Association supplying all the necessary information. The Mediator noted the scheduled bargaining session on September 22 and asked if under the circumstances it should be held. After caucusing, the Union determined not to put the offer to a vote. Gatto's notes reflect that the Mediator informed the Association that the September 22 session would be cancelled because the Union would not be offering a counter proposal.

q. Post September 20 Exchange of Correspondence

On September 22, 2005, Crosatto sent to Waud a 4 page letter respecting the state of negotiations, indicating the Union committee had met to consider the Associations request that the Union "vote the offer", and answering: "While there are features of your proposal that have considerable appear, there are far too many unanswered questions to bring this proposal to the membership for a vote."

The letter complained:

- Rather than working with the mediator to find solutions, the Employers seemed to spend their time adding and deleting things from their proposal without any explanation or attempt at bargaining in a transparent attempt to force an impasse.
- The Union does not believe we are even close to impasse and that further bargaining will produce a contract that is acceptable to all parties.

In the letter, Crosatto noted that the parties had seemingly found in new flat rate and bonus systems of unit employee compensation a means of reaching agreement by increasing the revenues of employees and thus allowing them to take on some of the health benefit costs the Employers wished to discontinue. The letter then asserted:

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When we then requested to negotiate the many details that would lead to a successful flat rate program, your response was that it would be way too time-consuming and that you would only accept Craig Andrews negotiating the details after the contract had already been ratified.

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We would be completely remiss in our duties if we left possibly the most important part of any contract to be negotiated after ratification.

Crosatto then turned to the issue of requested information:

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There are a number of other changes that you have made to your offer than went unexplained or which significant information necessary to bargain is lacking:

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1) After deciding that you did not wish to bargain over the elements that dealers would use in deciding whether or not to pay people over scale and withdrawing your proposal on discretionary wage increases, it suddenly re-appeared on September 16<sup>th</sup>. Before we can agree to this, we must again ask you to list and bargain over those factors which the dealerships would consider in paying people over scale.

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2) You are proposing a reduction in installer wages and an expansion in their number and duties. On July 27<sup>th</sup>, we made a basic information request about installer duties which was only partially complied with. We renew our request.

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3) You have proposed a complete change in the pay plan for Service Advisors. On July 16<sup>th</sup>, I requested some basic information needed to evaluate the program. Again our request was only partially complied with. Please comply.

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4) Your proposal for parts people has again resurrected discretionary pay increases as well as unspecified incentive programs that *may* [italics and bolding in original] take place in the future. Our intent is to bargain wages at the table so we will need to see the details of these programs before we can decide whether this proposal is acceptable.

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5) Your proposal for Body Shop Techs refers to flat rate, yet at the table Mr. Brunelli stated that you were not proposing the use flat rate be rather estimated times. If would be helpful if we knew exactly what you were proposing.

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6) In regards to flat rate, we want to bargain over it. We made an information request on September 16th. You refused to even entertain it. We cannot effectively bargain over your proposal without the appropriate information. We renew our request. I should also note that when we requested some very basic productivity information on August 18<sup>th</sup>, the Employers didn't bother to furnish it until the beginning of the meeting on September 16<sup>th</sup>. . . .

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7) We informed you early in bargaining and again on September 20<sup>th</sup> that your proposal to remove the Dispatcher classification was not a mandatory subject of bargaining and that we weren't going to entertain it. Yet it remains in your proposal.

- 8) Your Health and Welfare proposals have been all over the map. As recently as two meetings ago, you stated that you weren't wedded to California Motor Car Dealers and were looking at other coverages. In July, you gave us rates that were supposedly accurate. On August 26<sup>th</sup>, you wrote and requested our assistance in obtaining a more accurate price quote. As recently as this morning, I understand one of the Dealers is trying to obtain census data on employees for the purpose of getting a rate quote. It's awfully difficult to explain to members the ramification of changing plans when we don't know what the new clan costs.
- 9) Your proposal to allow discretionary contributions to the Pension is illegal and should be withdrawn. . . .
- 10) Before we can decide whether or not to agree to your past practices proposal, it would be very helpful to know what the Employers considers to be past practices. We can then verify this with the employees of each dealership and ensure that none are missed.

On September 30 Waud responded to Crosatto by letter including a modified offer. In his 5-page letter, he demurred to Crosatto's complaints respecting negotiations and complained of a paucity of Union proposals and Union agent statements that the Union was in no hurry to negotiate. Waud addressed information requests:

Your letter also failed to take into account the fact that the Agreement's flat rate installation language clearly was always intended to let *each individual dealer*, not the Association as a whole [italics in the original], negotiate a flat rate system that is tailored to each dealership, and it was also always intended that such negotiations take place after the contract was ratified whole [italics in the original]. This means that whatever information (over and above what has already been provided to the Unions) becomes necessary to allow each individual dealer and the Unions to complete the negotiations for that dealership can be obtained at the time it is needed.

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With regard to your claim we have not complied with your information request for the flat rate system, I want to remind you that the Association has given the Unions all related information that was available. In addition, two of the dealerships do not even record productivity information.

Waud's letter further noted that the Association's proposal respecting the parts employee incentive program, like the installation flat rate system, was based on the proposition that "each individual dealer's part department situation is different and any incentive program would have to be installed on an individual dealer basis." The letter also further explained in greater detail the service advisor and body shop technician pay plans. The letter also contained the following paragraph:

The Association is extremely disappointed with the Unions' approach to these very serious negotiations. The Unions have not shown a desire to reach a meeting of the minds or to deal with the Dealer's issues during this difficult economic period. The Association believes based on all indications from the last thirteen meetings, the Unions have no intentions of reaching an agreement. The Association therefore informs the East Bay Automotive Council and its

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constituent Union s that we believe we are at a bargaining impasse. The Association, therefore, will implement its Last, Best and Final Offer [capitalization in the original] effective October 1, 2005. This action is based upon a unanimous decision by all the Members.

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The letter also asserted that the Association had provided the Union with the preliminary costs of the CMCD health coverage plan and that when the Association obtained more current rates the Union would be notified.

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The letter further agreed to delete elements from the 9/20 offer: the proposal to delete the dispatcher from the represented unit and the language reserving to the Employers the right to make additional pension contributions. These changes plus the correction of typographical errors were incorporated in the attached proposal.

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On October 1 and thereafter the Respondents initiated various changes in the bargaining unit's terms and conditions of employment. In October and following the parties exchanged various correspondence each challenging the other's positions. The instant charges followed. No agreement on a new contract had been reached as of the time of the instant hearings close.

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#### 3. October 8 and 10 Events at San Leandro Nissan

The Union held a meeting on or about October 6 and decided to undertake demonstrations at Association dealerships in support of the Union in bargaining and in opposition to the Association's final offer. San Leandro Nissan parts department employee Christine Huddleston spoke at the meeting in support of the Union and in opposition to the Association proposals.

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On Saturday, October 8, 2005, perhaps 12-18 employees of San Leandro Nissan, including Huddleston, and between 60 and 100 other individuals picketed and hand billed on the public sidewalk in front of the show rooms and across the service department driveway of the San Leandro Nissan facility in support of the Union's position in negotiations. When opportunity presented itself, demonstrators spoke with visitors to the facility in some cases inducing the visitors to leave the area. The demonstration was orderly and access to the facility was not blocked. Huddleston patrolled with her young children.

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San Leandro Nissan's Vice President Al Keller at the San Leandro Nissan facility recognized various demonstrators, including Huddleston, as San Leandro Nissan employees. He recorded the demonstrators' activities by taking photographs from inside the facility with a digital camera. Later Keller reported his picture taking to San Leandro Nissan owner George Assoun who approved his actions. Keller testified he took the pictures because of his experiences at a different auto dealership in Menlo Park, California in 1987 or 1988, when labor picketing had been aggressive and property damage had occurred.

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On Wednesday, October 12, 2005, Huddleston, who was working at the time, and other employees were summoned to a meeting at which Assoun angrily challenged the truthfulness of criticisms in the Union's leaflets and literature which had been passed out at the earlier demonstration by reviewing the literature's representations essentially line by line. He answered an employee question informing employees that no one would be fired, but that he was very angry.

Following the end of that meeting Huddleston returned to work, but five minutes later was summoned to Keller's office where she found Assoun at the office desk. Also present were Parts Manager Goularte, Union shop Steward Amor Acquino, Assistant Parts Manager Kerry Nelson and an employee who had earlier warned Huddleston about engaging in protected activities, Bill Murray.

Assoun had Huddleston take a seat, assured her she would not be fired, and then lectured and criticized her for her "lies" on the picket line. Holding and referring to the contents of Huddleston's personnel file, he reviewed her wage history with San Leandro Nissan and told her that her picket line assertions to the contrary were lies which perhaps she did not remember because she was too drunk at the time. The meeting ended within a few minutes when Huddleston began to cry and challenged Assoun declaring in high dudgeon she had been insulted by his accusations and that she had had her children with her on the picket line. She left the meeting and soon reported to her assistant manager that she was too upset to continue working and left the facility.

# C. Analysis and Conclusions

## 1. Narrowing the Issues

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The principal contention of the General Counsel's complaints and the primary focus of the parties were the allegations that Respondent's October 2005 and subsequent changes in the terms and conditions of employment of the unit employees was improper and violated Section 8(a)(5) and (1) of the Act. The government pled this conduct was wrong under two theories of a violation of Section 8(a)(5) of the Act: a main theory and an alternate theory. A separate, freestanding, allegation in the complaint against San Leandro Nissan addresses the conduct occurring at San Leandro Nissan and alleged it violated Section 8(a)(1) of the Act. Each of these allegations along with the position of the parties is described separately below

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a. The General Counsel's Main Theory of a Violation of Section 8(a)(5) of the Act

The principal allegation of the General Counsel's complaint was that the Respondent's October 2005 and subsequent changes in the terms and conditions of employment of the Unit employees was improper and violated Section 8(a)(5) and (1) of the Act because the parties were not at impasse at the time the changes occurred.

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An employer or a bargaining association of employers subject to the National Labor Relations Act, whose employees in an appropriate bargaining unit are represented by a labor organization or labor organizations, has an obligation under Section 8(a)(5) of the Act to recognize and bargain with the union concerning terms and conditions of employment of employees and, if an agreement has been reached, to reduce to writing and sign such an agreement. The Association and the Unions have such a longstanding relationship concerning the unit employees and have negotiated a series of collective bargaining contracts.

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When a collective bargaining agreement expires, or as the expiration date approaches, employers or an association of employers are obligated to bargain with the requesting union in good faith concerning terms and conditions of a new collective bargaining agreement. During the period of negotiations for a new contract, the employer, absent certain special circumstances some of which are discussed below, must maintain the terms and conditions of

employment for represented employees extant at the time of the contract's expiration. 10 There is no complaint allegation that the Employers herein failed to meet this obligation at least until they made certain changes in unit employees' terms and conditions of employment in and after October 2005.

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An employer is permitted under Board law to change terms and conditions of represented employees in a variety of settings and circumstances. Several are relevant herein. First, there are situations involving a union's failure to meet its own obligations under the statute to bargain in good faith with the employer. The employers' bargaining obligation and its concomitant obligation to hold steady unit employees' terms and conditions of employment during the bargaining process depends on the good faith bargaining of the union during the bargaining process.

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Thus, for example, a union that simply refuses to meet and bargain with an employer will not be heard to complain of changes an employer made to represented employees terms and conditions of employment that it had offered to bargain with the labor organization about, but concerning which the union refused to meet and bargain. So, too, other bad faith conduct by a union representing employees during bargaining may free an employer from its obligation not to change terms and conditions of employment of represented employees during bargaining. The Respondent argues, and General Counsel and the Charging Party oppose the argument, that the Charging Party engaged in such conduct herein and by so doing freed the Association to make changes in employees working conditions.

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An employer is also privileged to make certain changes to employees' terms and conditions of employment, if the parties have reached an impasse in bargaining. The term impasse as used here is a term of art well defined by a substantial body of law. The Respondent argues, and General Counsel and the Charging Party oppose the argument, that the parties had reached an impasse in September 2005 privileging the Association's subsequent changes in represented employees terms and conditions of employment.

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b. The General Counsel's Alternative Theory of a Violation of Section 8(a)(5) of the Act

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Counsel for the General Counsel's initial theory of an 8(a)(5) violation as noted above is that the Respondents made changes in employees terms of employment at a time when no impasse in bargaining had occurred. Her alternate theory specifically pled in the complaint as an alternate theory, as to certain specific changes allegedly made by the Employers, is that even if an impasse had taken place privileging the implementation of the Respondent's final offer, the specific changes alleged in the complaint under the alternate theory of a violation were not implemented in a manner consistent with the final offer and those changes therefore violated Section 8(a)(5). The Charging Party joins the argument of the General Counsel. The Respondents oppose the allegation.

c. The Allegations of Violations of Section 8(a)(1)

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The General Counsel and the Union argue that photographs taken of the peaceful union demonstrators and employees at San Leandro Nissan, on or about October 8, by a San Leandro Nissan manager violated Section 8(a)(1) of the Act because it was improper surveillance of the union and protected concerted activities of unit employees and others. The

<sup>&</sup>lt;sup>10</sup> Not every element of an expiring contract's terms and conditions of employment survive its expiration, but generally wages and hours do.

General Counsel and the Union each cite *F. W. Woolworth Co.*, 319 NLRB 1197 (1993), for the proposition asserted and aver that the Board holds that it is not legitimate justification for such conduct to assert that something adverse might happen during the demonstration so that an accurate record of activities should be made citing *Brunswick Hospital Center, Inc.* 265 NLRB 803 (1982).

The Respondents acknowledge General Counsel's arguments and citations as reflective of the current state of Board law but argue on brief at 37:

While the Board continues to believe that mere picture taking is somehow coercive, that is simply not a realistic view in today's workplace. . . . The Board should re-examine this subject.

The General Counsel argues that, considering the entire sequence and context of events, the meeting of San Leandro Nissan management with employee Huddleston on October 12 violates Section 8(a)(1) of the Act. While the General Counsel does not assert that standing alone, casual questioning by management of a self identified union supporter is a per se violation, counsel for the General Counsel argues that where, as here, it is clear from the totality of circumstances that an employee such as Huddleston would reasonably have tended to have been restrained and coerced by the conduct involved. The conduct violates Section 8(a)(1) of the Act. Rossmore House, 269 NLRB 1176 (1984) and Sunnyvale Medical Clinic, 277 NLRB 1217 (1985). The Charging Party joins the General Counsel. The Respondent emphasizes that no discipline was administered to any employees during these events and further that "there was no coercive interrogation." (R. brief at 38.)

2. Analysis Respecting Specific Allegations and Defenses

a. The Allegation the Respondent's Made Broad Wrongful Changes in Unit Conditions

As noted supra, there is no doubt that the Respondent in and after October 2005 implemented changes in represented employees terms and conditions of employment which had not been agreed to by the Charging Party. Thus at issue in this portion of the case is not that the changes occurred, but whether or not they were in violation of the Act. Two factually related, but legally independent theories of defense were litigated: (1) that the Union's bad-faith bargaining privileged the Respondents to make the changes they did, irrespective of the question of impasse and, (2) that the changes to unit employees' wages and working conditions occurred followed the occurrence of an impasse in bargaining and are not impermissible for that reason. These defenses are discussed separately below.

1). Did the Union engage in bad faith bargaining privileging the Respondents Actions?<sup>11</sup>

The Board holds that a respondent employer is not privileged to make changes in unit employees working conditions during bargaining absent impasse save in very limited circumstances. One of such circumstances is when the union is itself engaged in bad faith bargaining such as engaging in tactics designed to delay bargaining. *Bottom Line Enterprises*,

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<sup>&</sup>lt;sup>11</sup> The defense of Union conduct justifying the Employers' change in employees terms and conditions of employment is considered first herein because a finding in the Respondents' favor in these regards has the potential to resolve all the allegations of violations of Section 8(a)(5) of the Act alleged in the complaint without reaching the question of impasse.

302 NLRB 373 (1991); *RBE Electronics of S.D., Inc.*, 320 NLRB 80 (1995). The Respondents argue such a proposition obtained during its bargaining with the Union. More particularly they advance the contention, found by the Board in *Serramonte Oldsmobile, Inc.*, 318 NLRB 80 at 99, fn. 61 (1995), that the Union had formulated and applied a strategy:

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[F]or the Union to frustrate the bargaining with Respondent Serramonte Oldsmobile in order to forestall any assertion of impasse by the [Respondent] so as to justify implementation of what were, to the Union, odious contract terms.

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The Respondents argue that the Union engaged in a bad faith course of conduct designed not to reach agreement, but rather to frustrate bargaining and thus forestall or delay implementation of the employers' proposals which were anathema to it. More particularly, the Respondent's argue that the Union bargaining through late arrival at bargaining sessions, early conclusion of meetings, cancellation of scheduled meetings, failure to agree to meet with sufficient frequency and the non-attendance of meetings by the lead union negotiator, Crosatto: all combined to improperly delay and stretch out the bargaining process.

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The Respondents further argue that the Union was irregular in attendance, difficult to schedule bargaining with, and during the numerous bargaining sessions held, made few proposals, accepted no Association proposals, attacked and disparaged the Association proposals, and suggested that the Union should not and would not ever accept the Associations proposals. Finally, the Respondents argue that the Union constantly made both oral and written information requests, insisted on detailed responses to those requests, complained of the lack of sufficiency of response to those requests and sometimes delayed bargaining until information was supplied as well as telling the employers that the Union could file endless information requests: all not to seek information designed to inform their bargaining or for other legitimate purposes, but rather to harass the employers and to delay and protract the bargaining process.

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The General Counsel argues the Union reasonably agreed to bargaining dates which were held on a regular basis – over the period of May to September 14 sessions were held. On the few occasions when the Union's lead bargainer Crosatto was not available, other agents of the Union with full authority were in attendance. The General Counsel notes that the Board has found in considering such an employer defense to unilateral change allegations, that inability to agree to all proffered bargaining dates is not evidence of bad faith citing *The Ford Store*, 349 NLRB No. 13, slip op. at 6 (2007). She notes further that the Board had made similar findings respecting union cancellation of bargaining sessions for legitimate business reasons. *SCA Services of Georgia*, 275 NLRB 830, 834 (1985), and for the cancellation of an afternoon session due to other union business citing *Bottom Line Enterprises*, 302 NLRB 373 (1991).

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The General Counsel further argues that the Board has not found tardiness of a union negotiator to be evidence of bad faith where the period involved was 10 to 20 minutes per session *Houston Country Electric Cooperative*, 285 NLRB 1213, 1215 (1987). The government argued at length that the situation advanced by the Respondents in *Serramonte Oldsmobile*, *Inc.*, 318 NLRB 80 (1995), where the Union was found to have engaged in a plan to frustrate negotiations, is completely distinguishable for the instant situation in that the Serramonte Oldsmobile bargaining was delayed for more than 3 months, the union there took sham positions and failed to communicate with employees about what they desired in bargaining.

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The Charging Party joins the General Counsel in arguing that the lateness of Crosatto at bargaining sessions, while recurrent, was not of significant duration or significance and became

more a matter of humor than outrage.<sup>12</sup> The Charging Party argues further that its information requests were relevant and necessary to ascertain what the Respondents were in fact offering. They argue that the failure of the Union to make detailed counter proposals was a result of the employers' ultimate failure to explain and negotiate the change in employee remuneration – flat rate or incentive plans – that the Union hoped to rely on to make a contract with the other concessions more palatable to represented employees.

The arguments of the parties require a detailed examination of the bargaining sessions at a level of detail well beyond that presented in the basic summary set forth supra. I have examined and considered the record evidence with particular focus on the acts and conduct in controversy herein even though I find that the need to avoid an even longer decision precludes its presentation here. Having made that examination, I am unable to conclude that the Union engaged in bad-faith bargaining designed to delay and defeat bargaining and avoid impasse, so as to put off the Respondents ultimate implementation of its proposals which would without doubt substantially reduce the total wages and benefits enjoyed by the unit employees under the expired contract.

More particularly, I find that the Union's scheduling, time and attendance, and conduct at the bargaining sessions, while not free from irregularity and outburst in their totality, <sup>13</sup> as a course of conduct do not support a finding of bad faith or intent to improperly delay bargaining. Sessions were scheduled and conducted with some regularity. Attendance both in timeliness and by the Unions bargainers was not fatally irregular. I make similar findings respecting the relative paucity of the Union's proposals and/or counter proposals. While discussed in greater detail supra in regards to the issue of impasse, the Union's position, stated in later bargaining was that they were "working off" the Association's proposals and that this was because they were very interested in the Association's proposed incentive or flat rate systems to increase unit employee remuneration so as to allow the employees to weather the other reductions the Respondent's proposal, was not unreasonable.

Given all the above, I reject the Respondent's proffered defense that its changes in unit employees' terms and conditions of employment, in and after October 2005, were justified and not a violation of the Act because of the bad faith conduct of the Union during the bargaining preceding the changes.

# 2). Were the Parties at Impasse in September 2005?

Counsel for all the litigants well understood that the question of whether or not the parties were at impasse in September 2005 was at the heart of the dispute herein. This was so because they all knew that if impasse had occurred, at the very least many of the Association implemented changes to unit employees' wages, hours and working conditions in and after

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<sup>&</sup>lt;sup>12</sup> Indeed Crosatto's attendance at the instant hearings tended to show his regular lateness was endemic or a personality flaw rather than animated by distain for or a motive to delay the bargaining process.

<sup>&</sup>lt;sup>13</sup> While parties in bargaining unfair labor practice cases tend to look with alarm at the conduct of the opposing party in bargaining and see little in the other side's bargaining but animus and misconduct, much of such asserted horribles are the subjective impressions of partisans. Further the bargaining process generally – in all events from the experienced eyes of the Board – is not so fragile that minor matters, events or circumstances, render bargaining by one party or the other to be in bad faith. Good faith bargaining tolerates and encompasses robust advocacy and imperfect procedural implementation.

October 2005 would have been privileged, It is well to discuss the applicable law relevant to impasse as applied to the instant case in some detail.

The Board's longstanding holding concerning the effect of an impasse on bargaining has been recently restated in *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).

[W]hen, as here, the parties are engaged in negotiations, an Employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole.<sup>9</sup>

<sup>9</sup>See NLRB v. Katz, 369 U.S. 736 (1962); NLRB v. Auto Fast Freight, 793 F.2d 1126, 1129 (9th Cir. 1986), enfg. 272 NLRB 561 (1984); Winn-Dixie Stores, 243 NLRB 972 (1979); Taft Broadcasting Co., 163 NLRB 475, 478 (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

See also Western Publishing Company, 269 NLRB 355 (1984).

An important early case on the issue is the above cited case of *Taft Broadcasting Co.*, 163 NLRB 475, (1967), enfd. sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). The Board, in *Taft* at 478, listed important criteria for impasse to have occurred:

Whether a bargaining impasse exits is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

The burden of proof is on the Respondents to show that an impasse existed. *Outboard Marine Co.*, 307 NLRB 1333, 1363 (1982).

The Board and the Courts have more specifically characterized the concept of impasse in various cases relevant to the instant case. Thus in *Laborers Health and Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539, 543 (1988), the Court held that an impasse comes into existence when the parties have exhausted prospects of reaching an agreement and further negotiations would be fruitless. The Board in *Highway Billboards*, 206 NLRB 22 (1973), at 23, held that impasse exists when, despite best efforts to achieve agreement, neither party is willing to move from its position.

There is also an issue in impasse determination whether or not impasse over a single or but a few issues is sufficient to render the entire bargaining relationship at impasse. The Respondents, on brief at 18, cite the Board's recent case in *Richmond Electrical Services, Inc.*, 248 NLRB No. 62, slip op. at 2 (2006):

Although impasse over a single issue does not always create an overall bargaining impasse that privileges unilateral action, it may do so when the single issue is "of such overriding importance" to the parties that the impasse on that issue frustrates the progress of further negotiations. Citing *Calmat Co.*, 331 NLRB 1084, 1097 (2000).

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In considering the parties' arguments respecting the existence or absence of impasse in September 2005, it is also relevant to consider the complaint allegations at issue. Setting aside the independent allegation of violations of Section 8(a)(1) of the Act, the General Counsel's complaints' unilateral change allegations against the Respondents without exception are directed to the period after the date of the contested impasse. Thus, the General Counsel's complaint does not allege that any of the Respondents at any time preceding the October 2005 changes in unit employee terms and conditions of employment engaged in any violation of Section 8(a)(5) of the Act. Indeed, the General Counsel specifically omitted to allege in the complaint that the Association violated the Act by refusing to provide, or delaying the provision of, information to the Union even though the Unions had made such an allegation in one of the charges herein.<sup>14</sup>

The factual case for impasse is advanced by the Respondents. Thus, they argue that during the entire bargaining, the Respondents had made it clear, and backed their words with proposals, that the cost to the employers of the expired contracts health and welfare coverages must be reduced, essentially in half, and that pension contributions must be reduced even more. Throughout the negotiations, the Union, with the exception of a very few offers of partial freezes of wages and or benefits, not only did not agree with the employers offers, but rather belittled and dismissed them and made essentially no counter proposals concerning either.

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The Charging Party and the General Counsel challenge the position of the Association. The Union freely admits that the Association's proposals in regards health and pension were horrific from the employees' perspective in calling for greatly reduced benefits. But, argues the Union, it was interested, and had communicated that interest to the Association at the table. understanding in the Association's offers respecting modification of the employees' compensation system from wage based to incentive based remuneration. The Unions suggest they listened with interest to the employer negotiators suggestion that such a change in compensation form could substantially increase the employees' total compensation. The Unions argue that they had made it clear to the Respondents – and they did in fact believe themselves – that they would consider the employers' proposals as a package and hoped that increased compensation under incentive systems would make the health and pension reductions palatable as part of an overall package. Thus they argue that the bargaining was making progress and that greater progress would immediately be made when the Unions sufficiently understood the Employers offer so that it could accept the proposal as a totality or could formulate its own proposal which would narrow the differences between the parties in bargaining.

The General Counsel and the Charging Party further challenge the impasse contention of the Association by asserting that the Association had regularly and repeatedly responded to the Council's information requests with partial and or delayed provision of the requested information and that by September the Association was overtly denying the union requested information under the announced and defiant rationale that the Council simply did not need the requested information.

Such refusals argue the Charging Party and the General Counsel prevented the Council from being able to understand the proposals of the Association in important parts and further

<sup>&</sup>lt;sup>14</sup> The charge in Case 32-CA-22510, one of two charges underlying the complaint against San Leandro Nissan, specifically alleged that the Employer had "failed to provide necessary information reasonably requested in the course of bargaining" in violation of Section 8(a)(5) and (1) of the Act.

prevented the Union from making informed counter proposals in bargaining. The rigidities and delays in the bargaining caused by the Association's failure to provide needed and requested information to the Union relevant to that bargaining were therefore caused by the Association. The General Counsel and the Charging Party argue that impasse requires that the parties be sufficiently informed of the other parties' position as a precondition to any legal conclusion that further progress in bargaining is not possible. That did not occur in the instant case they argue due to the withholding of information by the Association and therefore the seeming distance between the outstanding positions of the parties in September 2005 was tainted by the Union's lack of requested information and may not be a proper basis for finding that impasse occurred.

The Respondents challenge the Charging Party and the General Counsel's view that the Union's information requests were not complied with by the Association in certain cases and that the requested information in other cases was needed by the Union to bargain. Rather the Association argues the later information requests concerning employee work content issues were not an attempt by the Union to understand the proposed incentive pay proposals but were simply a tool for delay, made in bad faith, and, the Association argues, are themselves evidence that the parties were at impasse. The Respondents advance the Board's analysis in *ACF Industries, LLC.*, 347 NLRB No. 99, slip op. at 4 (2006), in which the Board found last minute information requests by a union to an employer at the end of bargaining to have been tactical and submitted solely for delay and to avoid a finding of impasse.

The information requests - both their relevance and the degree to which information had been provided - made during bargaining are important to resolving the issue of impasse herein. It is not necessary to deconstruct and analyze each exchange. As noted supra, there are no complaint allegations of statutory violations based on responses to information requests. The pattern of information request and response over the entire process of bargaining with a focus on later events and understanding of what was requested and what was supplied or not supplied, as well as the relevance of the information - all are properly considered in determining if the parties were at impasse in September 2005.

Respecting these information issues, each side on brief views its own conduct as exemplary and the opposing side's conduct as negligent or malicious. Neither side is fully successful in its arguments. In some cases the Union made information requests respecting work matters at the individual dealerships and the Association provided information that was in part responsive, in part in a form not precisely as requested, and in part simply missing. The Association argues the Union often did not need the information, did not use the information that was given, and should have known that there were good and sufficient reasons for the supplied information being either incomplete or in a form other than as requested. In some cases the gap between the information requested and the information supplied plus the importance of the information not supplied on this record is in a bit of a muddle and definitive conclusions respecting the reasonableness of each separate response is not possible.

Further, as the Respondent has argued and supported by case citation, where there is but one or only few key areas of disagreement on which the issue of impasse hangs, minor, collateral issues including information issues as to unrelated matters are of lesser importance. Given these factors, I do not find it necessary to address each and every information request and the extent, timeliness and over all reasonableness of each and every information response.

Two areas of information requests, however, are important and need to be discussed: the information requests made respecting the CMDA health plans and the information requests concerning elements relevant to the Employers' plans for future mid-contract changes in employee compensation. That is so because of the centrality of the bargaining differences they

relate to and because of the specificity of the disagreement regarding the sufficiency of the Association responses.

Turning to the health coverage information requests, the Union argues that it never got all the information it requested and that it never received the critical cost information it sought respecting the CMDA health coverage. The Association answers that it gave large quantities of information to the Union at the soonest opportunity and, importantly, it also gave the Union the name and contact numbers of the CMDA health plan agents who could supply the Union with any information they needed. The government and the Union argue the Union did in fact request information directly from the health plan agents, but that once again not all requested information was forthcoming.

I have considered the arguments of the parties regarding the health information requests and the extent they were met. I also note that the Union specifically elected to deal with the health plan agents only in writing and chose not to telephone those agents for follow-up requests when the Union determined more information was needed. I also note that the Union sought, but did not receive certain cost or premium information about the health plan because the Association had not been itself able to obtain that information. Future premiums and costs had not been determined or at least released by the health plan. Finally, I have considered this issue in light of the Union's argument that the Association's written offer was suspicious in that it did not specifically name the CMDA plan even though when asked, the Association repeatedly said that the CMDA plan was the one encompassed in its offer.

The issue before me concerning the health care information request and whether or not the requests were sufficiently met is not the traditional consideration of whether or not an unfair labor practice occurred. Rather, the issue here is whether or not the Union's information requests were sincere and sufficiently improperly unmet so that the Union could not sufficiently understand the worth of the health plan offer of the Association or evaluate it sufficiently to accept it or to formulate a counter proposal to it. I find that the health information requests were met sufficiently to meet that narrow standard. Given the entire context as discussed above, I find the Union had sufficient information, given that some information was not yet available to the Respondents and that the Union received a great deal of information and was provided an opportunity to telephone the plan in real time and speed up or focus provision of additional information. As to health plan information, I find the Union may not assert that any Association failure prevented the Union from understanding the Respondents' health plan proposal.

The second area of information requests which is needful of discussion is the body of requested information relevant to the various incentive plans the employers proposed to put in place after the contract had been reached. Thus, the Union had asked for a variety of information concerning flat-rate pay and the employers simply refused to provide it as explained by Waud's letter to the Union dated September 30, 2005, in relevant part:

Your letter also failed to take into account the fact that the Agreement's flat rate installation language clearly was always intended to let *each individual dealer*, not the Association as a whole [italics in the original], negotiate a flat rate system that is tailored to each dealership, and it was also always intended that such negotiations take place after the contract was ratified whole [italics in the original]. This means that whatever information (over and above what has already been provided to the Unions) becomes necessary to allow each individual dealer and the Unions to complete the negotiations for that dealership can be obtained at the time it is needed.

Waud's explanation, as quoted above and as defended on brief, is predicated on the fact: (1) that the Association's final offer in September 2005 included incorporating Article XI of the expired contract which provided a framework and procedures for converting wage systems to incentive systems during the life of the contract and which limited the Union's rights to oppose such changes and (2) that its final offer contained the following additional language limiting the time the parties had to reach agreement after the contracts ratification in these regards:

[The Machinists] will cooperate with the members of the dealers association in the prompt installation of a flat rate pay system within 90 days maximum. (exception: new hires in the body shop flat rates begin at time of hire)

Also related to the issue is the fact that the Association's proposal on September 20 froze journeymen technician wages till September 30, 2007, with new hires after September 20, 2005, receiving a reduced starting wage. It also provided that the Association had discretion to pay over scale and finally provided that all past practices would remain fixed through the life of the contract.

The Association argues that the Association proposals respecting technicians or mechanics specifically provided changes in technician compensation which were to be negotiated and take effect only after the contracts ratification and therefore no information requested by the Union's relevant to those issues alone is by virtue of that fact in any way relevant to the contract bargaining and or the Association's final offer. Therefore the Association argues, the refusal to supply the information is not relevant to any issue respecting the existence of an impasse in September 2005.

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The General Counsel and the Charging Party argue that the Union's requested information relevant to possible changes in represented employees amount and form of compensation - a change from wage based to incentive based pay - was relevant during the course of the negotiations, i.e. in and before September 2005, for two reasons. First, they argue the information was necessary to understand and determine the acceptability of the Association's proposal to make such pay changes only after the contract was ratified and during the contract's life under an Article XI or scheduled negotiation process with the final result forced on the Union under a form of interest arbitration should no agreement between the Union and the Association otherwise be possible.

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Second, they argue the information was relevant to allow the Union to make a counter proposal in September on employee compensation whether that proposal for immediate implementation of the changed system of compensation was to occur at the start of the contract or whether it was to be deferred as the Respondents proposed. Thus the Union and the General Counsel argue the information was absolutely necessary to the Union irrespective of the deferred timing of the proposed implementation of the changes in the Association proposal. And, they argue finally, given the Union did not have this critical information because it had been withheld by the Association, no impasse could have existed at any time before October 2005.

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The question here does not concern whether or not the Association's refusal to negotiate mechanics compensation issues as part of the contract negotiating process or its refusal to provide information respecting that issue rises to the level of an unfair labor practice. The government's complaints do not allege this conduct as an unfair labor practice. The General Counsel argues on brief that the Association's conduct in this regard was an improper refusal to bargain, see e.g. GC brief at 97, fn. 47, but I reject the argument insofar as it suggests the Act was violated thereby as falling outside the pleadings. Nor is there a question presented herein

whether or not the Respondent's open and simple refusal to provide the Union the requested information relevant to this issue is a violation of the Act. As noted, supra, the Charging Party included such a wrongful failure to provide requested information allegation in one of the charges consolidated herein and the General Counsel did not make such an allegation in the complaint. I therefore will not test this conduct by the Respondents to determine if it rose to the level of an unfair labor practice.

All the above being so, the narrow question here then, is whether or not the Association's deliberate failure and refusal to provide the mechanics wage system information requested by the Union so that it might evaluate the employers' mechanic proposal and prepare its response, impeded the Union's evaluation of the employers proposal and its preparation of its own counter proposal to such an extent that impasse did not, indeed could not, occur. That issue requires the step by step analysis alluded to in the arguments of the parties noted above informed by the cases cited.

Based on the above and the record as a whole, I find that the Union's requested information was in fact relevant to the issues raised by the Association's proposals to modify the journeyman's compensation by the implementation of incentive compensation schemes. The fact that the Association proposed to bargain these issues within the three months period following the contracts ratification does not make it irrelevant or even less relevant than if the negotiations in September took up the issue in direct bargaining with no deferral of the process. This is so because the Union reasonably and logically needed to understand future possible outcomes respecting mechanic compensation under the Association's proposal before the contract terms could be settled.

Simply put, by agreeing to the Association's "negotiate and implement in future" proposal the Union was loosing a substantial degree of control over the technician compensation determination process which process, if agreed to as proposed by the Respondents, could result in a compensation formulary being imposed on the Union - even if it in that later bargaining process expressed its strong disagreement - because the employer's proposed contract protocols included a form of binding interest arbitration which had the potential of imposing a compensation system on the Union despite its continuing disapproval. Thus in September 2005, the Union was being asked to accept in a new contract a limited bargaining process, the result of which could bind it to important new terms for compensating unit employees, which new terms would continue in effect for the entire life of the new contract. Thus the future process was being negotiated now and the information respecting its significance to the Union was needed immediately. In order to consider, evaluate and prepare a counter proposal to such a proposal, the Union needed the information it requested without delay.

The employers argue that the Union's information requests were not submitted in order to obtain information to be used in negotiations. I have earlier rejected the general employer argument that the Union had been bargaining in bad faith. Here the information requested was clearly relevant to the mechanics compensation system that the employer proposed to bargain in the first three months of the contract under an agreed process backed up by binding interest arbitration. Indeed the Association did not so much deny the information was relevant to that issue, rather the Association simply announced it would not provide the information to the Union until after the contract was agreed to. In so precipitously denying the Union the information requested, the Association fatally undermined any argument it might have been able to make that the Union would not use the information it requested. The employers' refusal eliminated any change to put the Union's use or non-use of the information to the test.

I wish to emphasize that the question of how and at what level non-wage incentive based technician compensation should be specified is different from, and independent of, the issue of when that subject matter should be negotiated. The Union did not need the information it requested simply to determine what was being proposed by the Employer respecting that compensation. It also needed the information to determine the possible and likely outcomes of such a post contract ratification bargaining process, the better to determine whether or not it should agree or refuse to bargain the question later within the interest arbitration protocols the Association proposed. This latter question was ripe in September and the Union needed to take an immediate position on this important question. Since it did not obtain the information it could not decide what to do. In such a state of affairs, no impasse could or did occur.

An issue earlier discussed is the Association's argument that an impasse sufficient to justify employer changes in employees' in working conditions need not occur respecting all elements of negotiations. Here the Association is heard to argue that the impasse generated by the disagreement over pension and health and welfare contributions was so large and significant that the matter of mechanics compensation is irrelevant to the determination of whether impasse occurred. I disagree. The mechanics incentive compensation proposal clearly concerned a large part of the bargaining unit. It also concerned a matter each side had openly represented as important and a potential mechanism by which to settle the entire contract dispute. The Union made it clear in the final months of the negotiations that it hoped unit employee compensation changes — which both sides hoped could increase unit remuneration — could provide a basis for agreeing to a contract with the pension and medical elements of the Employers' proposal rendered acceptable by the increase in the employees' amount of compensation. Thus this issue was clearly no minor matter and was connected to a resolution of the entire dispute including strong differences in the health and welfare and pension proposals.

Based on all the above and the record as a whole, I find and conclude that the Union needed the information it had requested from the Association relevant to proposed changes to technician compensation based on incentive rather than straight wage formulation. There is no dispute the requested information was not provided and therefore the Union could not fully evaluate the Association's proposal nor effectively prepare its own counter proposals on the issue. I have found the matter of technician or mechanic compensation was a major matter in the negotiations and had the potential in both sides' eyes to be the basis for bridging all differences and reaching a new contract. Thus the Union's inability to sufficiently understand the consequences of the Association's proposal or make a counter proposal, which could also address the health and pension issues separating the parties, had a cascading and deleterious effect on the entire bargaining process. At this point in the bargaining process, the consequences involved in the Union's being unable to understand or respond to the Association's proposal on a deferred mid-contract installation of a mechanics incentive compensation plan were significant to the entire gamut of differences between the parties at the table.

I have found and concluded that the fact that the Union did not obtain the requested information prevented it from having sufficient information to take a position on important subjects in dispute in the negotiations. Such an inability to take a position is not the same as taking a firm unbending stand. The lack of information created uncertainty not certainty on the part of the Union which means, and I find that the bargaining was not at a deadlock in September 2005, wherein no movement by either party could reasonably be contemplated.

This being so, I further find and conclude that the failure of the Association to provide the information and its categorical statement to the Union that it would not provide the

information during contract negotiations but only after the contract was reached and ratified, prevented any impasse in bargaining from occurring. I do not find fault or suggest the employer committed an unfair labor practice in its bargaining through September 2005. No such unfair labor practice is alleged in the complaints. I do however find that no impasse in bargaining occurred during that period. The Respondents had the burden of proof to show that an impasse had occurred. I find they failed to meet their burden.

## 3). Conclusion

Finding no impasse occurred, it follows from the discussions and cases cited supra, that there was no justification or excuse for the Associations unilateral changes in represented employees terms and conditions of employment in and after October 2005. This being so, the actions of the Association in making those changes are unfair labor practices as alleged in the complaints and I so find.

# b. The Complaints Alternate Theory of a Violation

The complaints allege in the alternative that, if impasse had been found to have occurred, the Association still violated the Act in certain regards. Since I have found that no impasse occurred and that all the changes that the complaints allege under the alternative theory are improper because there was no impasse and were in violation of the Act, there is no need to consider the alternative theory. Having won on the broader theory, the implementation of the lesser included changes are also violative.

## c. The Allegations of Violations of Section 8(a)(1) of the Act.

The photograph taking by San Leandro Nissan management on October 8 is a violation of the Act under the cases cited by the General Counsel and the Union. The Respondent argues the law should be re-examined. Such a task is for the Board not its administrative law judges. I sustain this allegation of the complaint which is directed to San Leandro Nissan only.

The General Counsel is correct that *Rossmore House*, 269 NLRB 1176 (1984), teaches that the entire context of an allegedly coercive statement must be examined. Undertaking that here it is clear that all the circumstances combined to oppress Huddleston and make her reasonably apprehensive of engaging in future Section 7 activities and/or union activities after the Respondent San Leandro Nissan's agents met with her on October 12. Summoned to a meeting of Respondent San Leandro Nissan's management hierarchy where she was the sole employee under scrutiny, with numerous high management officials and her own supervisor present, Huddleston was called a liar and accused of having been drunk in the context of her union activities – the only activities discussed in the meeting. Her personal records were openly referred to by the owner. It was clear and she reasonably believed that the entire management team was now well informed of the hostile attitude of the owner toward her and a reasonable employee in such circumstances would likely believe that life on the job might well be more difficult in future because of her union activities. Her reaction in the meeting was both reasonable and to be expected. The term of art used in considering cases of this kind: that the employee's rights were chilled, is surely true in the instant case.

There can be no doubt and I find that by the alleged the conduct of San Leandro Nissans agents violated Section 8(a)(1) of the Act.

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# Remedy

Having found that the Respondents violated the Act as set forth above, I shall order that each cease and desist there from and post remedial Board notices. The notices as to all Association members except San Leandro Nissan will be the same save for the identification of the particular Respondent on the signature line where the individual name of each Respondent shall be entered. San Leandro Nissan's notice shall contain additional language addressing the violations of Section 8(a)(1) of the Act as set forth infra.

Respecting an affirmative remedy, the Respondents will be ordered to restore, at the request of the Union, the status quo ante, i.e. the employees terms and conditions of employment that were in place before the changes were instituted, and make employees whole for any losses incurred with interest. The Board in the recent case of *Paulus Enterprises, Inc. d/b/a The Ford Store San Leandro*, 349 NLRB No.13 slip op. at 1, set forth the proper remedy for the type of violations found herein.

Having found that the Respondent has violated Section 8(a)(5) and (1) by unilaterally withdrawing from and failing and refusing, since December 28, 2005, to make contributions to the Automotive Industries Pension Trust Fund as required by the parties' 2000–2005 collective-bargaining agreement, as extended, we shall order the Respondent to make all required contributions that have not been made since that date, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 6 (1979). The Respondent shall also reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The language of the Board's order applies to the instant case and is incorporated herein. Further the Board's recent direction of a clarifying footnote in a remedy in a similar situation shall also be incorporated. Thus in *Cibao Meat Products*, Inc., 349 NLRB No. 47, slip op. at 1, fn. 4 (2007), the Board stated

To the extent that an employee has made personal contributions to a fund that were accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

As necessary, difficulties and disputes in implementing the restoration of the status quo ante order and the make whole provisions herein may as necessary be resolved in the compliance stage of these proceedings

#### Conclusions of Law

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

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- 1. The Respondents are, and each one of them is, and has been at all times material, Employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The East Bay Automotive Council, the Machinists Automotive Trades District Lodge No. 190, Specialty Painters Union, Local No. 1176, and Teamsters Automotive Employees Union Local No. 78 are, and each one of them is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.
- 3. The East Bay Automotive Council, the Machinists Automotive Trades District Lodge No. 190, Specialty Painters Union, Local No. 1176, and Teamsters Automotive Employees Union Local No. 78 represent the Respondents' employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

All employees of San Leandro Nissan, Good Chevrolet, F. H. Dailey, McNevin Cadillac, Central Chevrolet, and Broadway Ford performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the July 1, 2001 through June 30, 2005 collective bargaining agreement between the Union and the Association; excluding all other employees, guards, and supervisors as defined in the Act.

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4. The Respondents violated Section 8(a)(5) and (1) of the Act by unilaterally changing certain terms and conditions of employment of represented employees in and after October 2005, without the agreement of the Charging Party, and at a time when no impasse in bargaining had occurred.

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- 5. Respondent San Leandro Nissan violated Section 8(a)(1) of the Act:
- (a) by surveilling employees union activities by taking their photographs during their picketing of San Leandro Nissan in October 2005.

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- (b) by coercively interrogating an employee concerning her union activities in demonstrating at San Leandro Nissan in October 2005.
- 6. The unfair labor practices described above are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

# **ORDERS**

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Orders.<sup>15</sup>

The Respondents, Good Chevrolet, F. H. Dailey, McNevin Cadillac, Central Chevrolet, and Broadway Ford, and each of them, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

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<sup>15</sup> If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

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- (a) Implementing changes in represented employees terms and conditions of employment including the discontinuance of any fringe or trust benefit coverages without reaching an impasse in bargaining with the Union or obtaining the Union's consent to the implementation of the changes.
- (b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
  - 2. Take the following affirmative action designed to effectuate the policies of the Act:
- (a) At the request of the Union, rescind and withdraw any and all changes to represented unit employees terms and conditions of employment occurring on and after October 2005, during which period the parties had not reached an impasse in bargaining, restoring such terms including fringe or trust coverages to the state they were in during the immediate pre-October 2005 period.
- (b) Make unit employees whole for any and all losses suffered as a result of the changes in working condition which occurred in and after October 2005 as set forth in the Remedy section of this Decision.
- (c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.
- (d) Within 14 days after service by the Region, post copies of the attached Notice at its San Francisco Bay Area facilities set forth in the Appendix I save that individual Respondent names and applicable case numbers shall be affixed to each Respondent's notice. <sup>16</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by each Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by each Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, any Respondents have gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent involved shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after September 2005.
- (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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<sup>&</sup>lt;sup>16</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

The Respondent, San Leandro Nissan officers, its agents, successors, and assigns, shall:

#### 1. Cease and desist from:

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- (a) Surveilling, by means of photography, demonstrators at its facility picketing and distributing literature in support of the Unions' position in collective bargaining.
- (b) Coercively interrogating unit employees respecting their conduct on the picket line and their union activities and support for the Unions in bargaining.
  - (c) Implementing changes in represented employees' terms and conditions of employment without reaching an impasse in bargaining with the Union or obtaining the Union's consent to the implementation of the changes.

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- (d) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.
  - 2. Take the following affirmative action designed to effectuate the policies of the Act:

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(a) At the request of the Union, rescind and withdraw all changes to represented unit employees' terms and conditions of employment occurring on and after October 2005, during which period the parties had not reached an impasse in bargaining, restoring such terms to the state they were had been during the pre-October 2005 period.

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(b) Make unit employees whole for any and all losses suffered as a result of the changes in working condition which occurred in and after October 2005 as set forth in the Remedy section of this Decision.

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(c) Preserve and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

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(d) Within 14 days after service by the Region, post copies of the attached San Leandro Nissan Notice at its San Francisco Bay Area facilities set forth in the Appendix II.<sup>17</sup> Copies of the notice, on forms provided by the Regional Director for Region 32, in English and such other languages as the Regional Director determines are necessary to fully communicate with employees, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted in each of the facilities where unit employees are employed. Reasonable steps shall be taken by the Respondent to ensure the notices are not altered, defaced or covered by other material. In the event that, during the pendency of these proceedings, Respondent have gone out of business or closed one or more of the facilities involved in these proceedings, the Respondent involved shall

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<sup>&</sup>lt;sup>17</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

	duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time after September 2005				
5	(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.				
10	Dated, Washington, D.C., April 5, 2007.				
15	Clifford H. Anderson Administrative Law Judge				
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#### **APPENDIX I**

#### NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

When a labor organization represents unit employees, the employer, during collective bargaining with the union, may not change represented employees' terms and conditions of employment unless the union agrees or an impasse has occurred in bargaining.

The National Labor Relations Board after a trial at which we appeared and offered evidence and argument found that we improperly changed employees terms and conditions of employment in and after October 2005 without the union's agreement and at a time when the parties were not at an impasse in bargaining. The NLRB has ordered us post this notice and to abide by its terms and promises to employees.

#### FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union Chose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Chose not to engage in any of these protected activities

Accordingly we give our employees the following assurances.

**WE WILL NOT** implement changes in represented employees' terms and conditions of employment at a time when there has been no impasse in bargaining with the Union and the Union has not consented to the implementation of such changes.

WE WILL NOT in any like or related manner violate the National Labor Relations Act.

**WE WILL** at the request of the Union, rescind and withdraw all changes to represented unit employees terms and conditions of employment occurring on and after October 2005 restoring such terms to the state they had been during the pre-October 2005 period.

**WE WILL** make unit employees whole, with interest, for any and all losses suffered as a result of the changes in their working condition which occurred in and after October 2005.

**WE WILL** preserve and within 14 days of a request, or such additional time as the Regional Director of the NLRB may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

The Machinists Automotive Trades District Lodge No. 190, Specialty Painters Union, Local No. 1176, and Teamsters Automotive Employees Union Local No. 78 represent the employees of employer members of the East Bay Motor Car Dealers, Inc.: San Leandro Nissan, Good Chevrolet, F. H. Dailey, McNevin Cadillac, Central Chevrolet, and Broadway Ford in the following collective bargaining unit:

All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the July 1, 2001 through June 30, 2005 collective bargaining agreement between the Union and the Association; excluding all other employees, guards, and supervisors as defined in the Act.

GOOD CHEVROLET, INC. d/b/a GOOD CHEVROLET

		F. H. DAILEY MOTOR CO., McNEVIN CADILLAC d/b/a McNEVIN CADILLAC VW, WASHINGTON TOWNSHIP CENTRAL CHEVROLET CO., d/b/a CENTRALCHEVROLET, BROADWAY MOTORS, INC. d/b/a BROADWAY FORD	
		(Respondent's fo	ull name)
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by Employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211 (510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

#### THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.

#### THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.

#### **APPENDIX II**

# **NOTICE TO EMPLOYEES**

Posted by Order of the National Labor Relations Board An Agency of the United States Government

When a labor organization represents unit employees, the employer, during collective bargaining with the union, may not change represented employees terms and conditions of employment unless the union agrees or an impasse has occurred in bargaining.

An employer may not surveil employees' union activities by photographing their peaceful activities. Nor may an employer coercively interrogate employees respecting their union activities and support for the unions in their bargaining with the employer.

The National Labor Relations Board after a trial at which we appeared and offered evidence and argument found that we improperly changed employees terms and conditions of employment in and after October 2005 without the unions agreement and at a time when the parties were not at an impasse in bargaining. The NLRB has ordered us post this notice and to abide by its terms and promises to employees.

#### FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union Chose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Chose not to engage in any of these protected activities

Accordingly we give our employees the following assurances.

**WE WILL NOT** surveil employees' union activities by photographing their peaceful activities in support of the Union

**WE WILL NOT** coercively interrogate employees respecting their union activities and support for the Unions in their bargaining with the East Bay Motor Dealers, Inc. and San Leandro Nissan.

**WE WILL NOT** implement changes in represented employees' terms and conditions of employment at a time when there has been no impasse in bargaining with the Union and the Unions have not consented to the implementation of such changes.

**WE WILL NOT** in any like or related manner violate the National Labor Relations Act.

**WE WILL** at the request of the Unions, rescind and withdraw all changes to represented unit employees terms and conditions of employment occurring on and after October 2005 restoring such terms to the state they had been during the pre-October 2005 period.

**WE WILL** make unit employees whole, with interest, for any and all losses suffered as a result of the changes in their working condition which occurred in and after October 2005.

**WE WILL** preserve and within 14 days of a request, or such additional time as the Regional Director of the NLRB may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all records, including an electronic copy of such records if stored in electronic form, necessary to determine if the terms of this Order have been complied with.

The Machinists Automotive Trades District Lodge No. 190, Specialty Painters Union, Local No. 1176, and Teamsters Automotive Employees Union Local No. 78 represent the employees of employer members of the East Bay Motor Car Dealers, Inc.: San Leandro Nissan, Good Chevrolet, F. H. Dailey, McNevin Cadillac, Central Chevrolet, and Broadway Ford in the following collective bargaining unit:

All employees performing work described in and covered by "Article II. Recognition and Bargaining Agent" of the July 1, 2001 through June 30, 2005 collective bargaining agreement between the Union and the Association; excluding all other employees, guards, and supervisors as defined in the Act.

		KELDENERI CORPORATION d/b/a SAN LEANDRO NISSAN HYUNDAI KIA		
		(Respondent's fu	ıll name)	
Dated	By			
		(Representative)	(Title)	

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by Employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211 (510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

## THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.

## THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC DOCUMENTS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing above.

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